categories of public service vehicles. Insofar as the statutory requirement of compulsory insurance cover for public service vehicle it is immaterial whether that public service vehicle is a hire car or a taxi cab.

Apart from the definition under section 2 of the Ordinance which states that "public service vehicle" means a motor vehicle used for carrying passengers for hire or reward or for any other consideration, support for my proposition may be found in the Federal Court case of *New Zealand Insurance Company Limited* v. *Sinnadorai*[1] where at p. 185 Ong Hock Thye C.J. after quoting the relevant portion of section 75(1) of the Road Traffic Ordinance had this to say —

"In plain language this means that insurance cover is compulsory in respect of (a) all third parties other than passengers carried by the insured, either for hire or reward, that is to say, in public service vehicles, . . . ."

Now, the real question at issue is whether Tay was one of the persons insured by the policy. Evidence was given by Douglas Francisco Moroh an insurance investigator to the effect that Tay hired the taxi from one Ah Seng paying $20 per day and that Tay himself never saw the owner of the taxi.

Tay however said that "On 27.3.67 I met with an accident. I drove vehicle No. BE. 5871. It belongs to someone else. It belonged to one Bu Teang Teck. As I was a spare driver I took over the taxi on that day. At that time he was residing in Singapore." Tay further said that he took over the taxi on that day from one Ah Seng and had to pay $20. The taxi was given out to Ah Seng and Ah Seng also had to pay the owner $20.

The facts of this case are somewhat similar to the facts in *Letchumi and Another* v. *The Asia Insurance Co., Ltd.*[2] except that there Lim Siew Liew to whom the taxi was hired out, testified that the owner had told him the taxi was hired to himself only and that he alone could drive it. He was further told not to rehire it to another person without the owner's knowledge or permission. There is no evidence of such express prohibition here. It is not therefore unreasonable to infer that Ah Seng, if at all there was such a person, had authority on behalf of the owner to employ another to drive the taxi, collect the $20 and pay to him (owner).

On the evidence before me I am also unable to conclude that Tay had not known the owner of the car. Tay did tell Mr. Douglas Francisco Moroh that the owner did pay him a visit at the hospital.

In the instant case there is also no evidence to show who this Ah Seng is. Mr. Douglas Francisco Moroh never interviewed him. In court he stated he did not see anybody else besides Tay. There was no evidence to show that he made any affort to trace him. Tay himself never saw Ah Seng after the accident. In my view, the circumstances in the present case irresistably indicate that there was no such person as Ah Seng. I firmly believe that Ah Seng is purely a fictitious person introduced solely for purpose of establishing that the defendants could not be liable as Tay had taken out the taxi from Ah Seng and was therefore never in the employ of the owner.

On the evidence before me it is my finding that Tay drove the vehicle not only for the owner's purposes but also with his consent or permission. It is my considered judgment that Tay was a driver in the insured's employ and was driving with the insured's permission. [See *Ormrod and Another* v. *Crosville Motor Services LD. and Another;*[3] and *Ormrod and Another* v. *Crosville Motor Services LD. and Another;*[4] see also *Rambarran* v. *Gurrucharran*[5]].

For these reasons I enter judgment for the plaintiffs in the sum of $30,000 and the taxed costs of $2,022.59 and interest at the rate of 6% per annum as from September 26, 1971. I also award the plaintiffs costs of this action.

*Order accordingly.*

Solicitors: *Lim Kean Chye & Co.; Joseph & Son.*

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## JUHARI BIN IBRAHIM v. PUBLIC PROSECUTOR

**[F.C. (Azmi L.P., Gill F.J. and Syed Othman J.)**

**January 8, 1973]**

**[Johore Bahru — Federal Court Criminal Appeal No. 21 of 1972]**

*Criminal law and Procedure — Defence of alibi — Disclosure of defence — Summing up — Penal Code S. 302.*

This is an appeal against the conviction of the appellant for murder. On appeal it was contended that the direction on alibi was insufficient. The learned trial judge had told the jury that where the defence was to be an alibi, it was the duty of the defence to disclose it at the earliest possible opportunity. It was argued that the jury should have been expressly told that the accused was entitled to stand on his right and say nothing and that he was entitled to keep back for reasons which he might think good the nature and details of his defence. It was also contended that the learned trial judge should have explained further to the jury the meaning of murder and culpable homicide not amounting to murder and should have told the jury what was the punishment for murder.

**Held,** dismissing the appeal: (1) the learned trial judge had no in his summing up made any observation which would amount to an invitation to the jury to form an adverse opinion against the appellant because he had not given an explanation as to his whereabouts at the earliest opportunity available to him. The direction on the defence of alibi was therefore proper;

(2) it was clear from the record that the jury was satisfied with the explanation in the summing up which the learned judge had given and the learned judge was correct in telling the jury that they should only concern themselves with the verdict to be arrived at and that the sentence was a matter for the judge.

*Cases referred to:-*

(1) *R.* v. *Hoare* [1966] 2 All E.R. 846.

(2) *R.* v. *Davis* (1959) 43 Cr. App. Rep. 215.

(3) *R.* v. *Gerard* (1949) 32 Cr. App. R. 132.

(4) *Haji Suleiman bin Haji Abdul Wahid* v. *Public Prosecutor* [1948] M.L.J. 32.

(5) *Fazal Din* v. *Public Prosecutor* [1949] M.L.J. 123.

FEDERAL COURT.

*C. K. G. Pillay* for the appellant.

*Annuar bin Haji Zainul Abidin* (Deputy Public Prosecutor) for the respondent.

**Azmi L.P.:** The appellant was convicted of murder at the High Court at Alor Star and sentenced to death. We dismissed the appeal and indicated that we would give our reasons later. We will concern ourselves with only two of the grounds which have been raised. The other grounds deal with facts. We are satisfied that the learned judge dealt with them adequately. We do not therefore think that we should consider them.

Counsel for the appellant has urged that the direction on alibi was insufficient. In summing-up the learned judge said: —

"Where the defence is to be an alibi, it is the duty of the defence to disclose it at the earliest possible opportunity, say at the end of the preliminary enquiry. However where such defence is not disclosed, then it is a matter which may detract from the weight to be given to such evidence."

It has been argued that the jury should have been expressly told that a man was entitled to stand on his right and say nothing, that he was entitled to keep back for reasons which he might think good the nature and details of his defence. Reliance for the argument was placed on *R.* v. *Hoare.*[1] The brief facts of the case were that the appellant was charged, *inter alia,* with robbery with violence; from the start he maintained that he had nothing to do with the robbery; it was not however, until the trial that he disclosed for the first time that his defence was an alibi. It was held:

"... though no doubt the jury had the words of the caution in their mind, they were never expressly told that a man was entitled to stand on his rights and say nothing, that he was entitled to keep back for reasons which he might think good the nature and details of his defence. Nothing of that was explained to the jury, and on top of that come the passages to which I have referred, the last two of which would clearly convey to the jury the inconceivability of an innocent man not giving the details of his alibi at once to the police if it were a true one."

The passages referred to above were strong comments made by the trial court in summing-up on the failure of the accused to disclose an alibi prior to the trial. The principle in the judgment as it appears to us is this: Where the trial court has made strong observations on such failure on the part of the accused, the jury must be told that he was entitled to stand on his rights to remain silent as indicated above. The authority referred to in the case *i.e. Davis'*[2] case shows that the trial court warned the jury that a man was not obliged to say anything but the court then in the course of summing-up made this comment:

"Can you imagine an innocent man who had behaved like that not saying something to the police about this in the course of the evening or the next day or even a little time afterwards? He said nothing."

In spite of the warning, it was held that this was a misdirection.

In *Gerard*[3] at page 134 Humphreys J. said,

"It (the comment) could be a misdirection only if it was an invitation to the jury to form an adverse opinion against the applicant because he did not then give an explanation."

The rule in a summing-up is well established. A judge should not invite the jury to make a particular finding of fact. That finding is a matter for the jury to decide. The judge is entitled to express his views strongly, but if he expresses them in such a way as to be construed as an invitation to a jury to make a finding of fact then there is a misdirection.

Of the authorities by our courts which deal with the alibi defence we need only cite two. In *Haji Suleiman bin Haji Abdul Wahid* v. *Public Prosecutor*[4] Aitken Ag. J.A. said:

"... The need for the exercise of care is of peculiar importance in this country in view of the right given to the police to interrogate accused persons as and when they think fit, and in view of the provisions of section 113 of our Criminal Procedure Code, as amended by Enactment No. 19 of 1936, which forbid the giving in evidence of any statement made to the police by an accused person in the course of a police investigation. In England it may be proper for a trial judge to observe that the failure to disclose an alibi defence in time to afford an opportunity of its being tested is something to be borne in mind with reference to the value of the defence. In this country, however, it seems to us that such an observation can hardly ever be made in fairness to the accused, because the judge can seldom if ever know to what extent the police were aware of an intended alibi defence before trial."

In *Fazal Din* v. *Public Prosecutor*[5] at page 126 Willan C.J. said: —

"There can be no objection to a trial judge commenting in his summing-up to assessors on the failure of an accused to disclose his alibi defence at the preliminary enquiry provided:-

(a) The trial judge points out that the preliminary enquiry is the first opportunity an accused person has of disclosing such a defence.

(b) That following *R.* v. *Littleboy* [(1934) 24 Cr. App. R. 192] the trial judge directs the assessors that failure to disclose an alibi defence at the preliminary enquiry is a matter which may detract from the weight to be given to such a defence."

In the present case we cannot see anything in the summing-up in which the learned judge made any observation which would amount to an invitation to the jury to form an adverse opinion against the appellant because he had not given an explanation as to his whereabouts at the earliest opportunity available to him. What he said was nothing more than to repeat the words of Willan C.J. in *Fazal Din's* case. In dealing with the defence story he forcefully pointed out the appellant's evidence that the appellant was at the appellant's house at the time the appellant was alleged to have been with the deceased; and he further stressed that the evidence was corroborrated by the appellant's wife. We are therefore of the opinion that his direction on the alibi defence was proper.

As to the second ground, towards the close of the summing-up the record shows the following: —

"*Jury:*

*Q.* Could we have an explanation of the section connected with the charge?

*His Lordship:*

I have already explained to you the section in the course of my summing-up with regard to the several intentions, *i.e.* section 300 of the Penal Code, which I will now read to you. (His Lordship reads section 300).

"*Jury:*

*Q.* What is the punishment if the accused is found guilty of the offence under section 302 of the Penal Code?

*His Lordship:*

Gentlemen, your duty is to arrive only at a verdict. It is for me to decide the sentence to be passed."

It has been argued that the learned judge should have explained further to the jury the meaning of murder and culpable homicide not amounting to murder and should have told the jury the punishment under section 302. It is clear from the record that the jury was satisfied with the explanation in the summing-up which the learned judge had given and with what was said further. We can see nothing in the summing-up that the jury could have misunderstood what had been explained to them. The second answer, in our opinion, was appropriate. Punishment is a matter which has been prescribed by law and for the judge to pass in accordance with the jury's verdict. In a jury trial, the jury need only be reminded that they should only concern themselves with the verdict to be arrived at.

*Appeal dismissed.*

Solicitors: *C. K. G. Pillay & Co.*